LIBRARY

Office-Supreme Court, U.S.
FILED
OCT 30 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1964

No. 546

ROSARIO MOGAVERO,

Petitioner,

—v.—

UNITED STATES OF AMERICA.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

ALFRED DONATI, JR.
Attorney for Petitioner
1271 Avenue of the Americas
New York, N. Y. 10020

32 CASE PRESS INC., 421 Hudson St., N.Y.—ORegon 5-4540

INDEX

	PAGE
1. As to the Question Relating to the Element of Knowledge of Unlawful Importation	1
2. As to the Question Relating to the Presumption of Continuance	3
3. As to the Remaining Questions	4
CONCLUSION	5

Case Cited

Brolan v. United States, 236 U.S. 216 (1915) 2, 3

Statute Cited

21 U.S.C. § 174 ..... 2, 3

IN THE

Supreme Court of the United States

October Term, 1964

No. 546

ROSARIO MOGAVERO,

Petitioner,

—v.—

UNITED STATES OF AMERICA.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

In its brief in opposition to the petition for a writ of certiorari herein, the Government has completely failed to meet the questions presented to this Court for review.

1. As to the Question Relating to the Element of Knowledge of Unlawful Importation.

The Government's sole argument (br., p. 5) with respect to the element of knowledge of illegal importation, is that since the conspiracy originated as one to import, as well as to sell, narcotics the presumption of petitioner's continuance in the conspiracy into the limitations period sufficed to warrant an inference of knowledge on his part "that importation continued to be one of the objects of conspiracy" in the limitations period. The basic fallacy in the Government's reasoning, however, is that there is no evidence whatever in the record to show that the con-

spiracy to import—as distinguished from the conspiracy to sell—continued into the limitations period (beyond August 15, 1957).

On the contrary, the evidence showed that the last importation from the Caneba brothers in Italy, the original source of the heroin, occurred in August 1955 (R. 452), and that the relationship with the Canebas was completely terminated in early 1956, long prior to the crucial limitations date, when, in the words of the Government's key witness, Rinaldo, a dispute "ended our operation with the Caneba brothers" and resulted in no further narcotics being obtained thereafter from Italy (R. 2480, 1343-4, 1361-2, 1374-5, 1397).

As shown in the petition herein (pp. 13-14), the Government, both at the trial and in the Court of Appeals, proceeded on the theory that any conspiracy to import had terminated prior to the limitations period and that the conspiracy within the limitations period was one to *dispose of* narcotics in violation of the *latter* portion of 21 U.S.C. § 174. The Court of Appeals clearly so treated the evidence (Pet., App. A, pp. 12a, 14a, 15a), and necessarily so. *Brolan* v. *United States*, 236 U.S. 216 (1915).

In short, the Government's contention assumes a situation in which the crime charged is a single continuing conspiracy to import narcotics illegally in violation of the first portion of 21 U.S.C. § 174. It obviously has no application to a situation such as that at bar, where petitioner has been convicted on the theory of a conspiracy to deal in narcotics in violation of the latter portion of section 174. As respects a conspiracy to deal in unlawfully imported narcotics, the requirement of section 174 is clear that there

must be proof of "knowledge of such previous, illegal importation" of the narcotics dealt in during the limitations period. See *Brolan* v. *United States, supra*, 236 U.S. at 217.

Moreover, apart from the equivocal nature of petitioner's December 1953 conversation (see Pet., pp. 20-21) and even assuming *arguendo* that such conversation could suffice as proof of knowledge in 1953 that narcotics *were to be* imported thereafter, any such knowledge was insufficient to establish the jurisdictional element requisite to conviction of petitioner under the latter portion of § 174 since that portion of the statute requires proof, by independent evidence, as of a point in time *after* the narcotics have in fact been imported (and thus while petitioner was in jail), that petitioner had knowledge that the narcotics dealt in within the limitations period *had been* previously illegally imported (see Pet., pp. 14-18).

In the case at bar there is a complete absence of competent independent evidence to show that petitioner ever obtained the requisite knowledge that narcotics, unlawfully imported after he was incarcerated in 1953, and dealt in during the limitations period (after August 15, 1957), had been so imported.

2. As to the Question Relating to the Presumption of Continuance.

The Government's conclusory unsubstantiated statement (br., p. 4) that the Court of Appeals was justified in finding the evidence sufficient to establish petitioner's continuance in the conspiracy beyond his incarceration in December 1953, avoids the issue of the rebuttal of the presumption of continuance (Pet., pp. 18-20), and begs the very

question of sufficiency here presented (Pet., pp. 20-21). The only purported evidence to support the Government's assertion that petitioner was "supervising and financing" the operation while in jail (br., p. 4) consisted of the ambiguous hearsay declarations of petitioner's brother, and the Government avoids any discussion of the crucial questions whether such hearsay declarations could serve to supply an essential element of the proof required (Pet., pp. 17-18, 21), as well as whether they could be considered by the jury on the issues of initial membership and continuance in the conspiracy before the jury had *first* determined those issues on the basis of the independent evidence adduced (Pet., pp. 22-26). The evidence in fact as to the operations even prior to petitioner's incarceration was that all decisions as to finances were made by the defendant Locascio (R. 43, 63, 66-68, 104).

3. As to the Remaining Questions.

The Government's contention (br., p. 6) that the remaining issues do not merit review at this interlocutory stage, ignores the fact that those very issues will necessarily be again presented to the Trial Court upon retrial, and review by this Court would serve the salutary purpose of avoiding the injection of error in a lengthy new trial.

The Government's assumption (br., p. 6) that the Court of Appeals "left to the trial court's discretion" the matter of use by defense counsel of the tape recordings before the jury, ignores the limitation which the Court of Appeals would allow to be imposed by the Trial Court—that there be a preliminary showing of inconsistency between the recording and the typewritten transcript (see Pet., p. 27).

CONCLUSION

For the reasons stated in the petition and in this reply brief, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

ALFRED DONATI, JR.
Attorney for Petitioner